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No. 85-1790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Cooper Union has petitioned for certiorari because the area, nature, and degree of authority that renders a faculty "managerial" under *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), is an important question of law upon which three circuit courts have rendered conflicting decisions. The Board and the Union do not dispute the importance of this question, but contend that the decision below is "fact-bound" and deny any inconsistency in application of the legal principles of *Yeshiva* by the circuit courts.

ARGUMENT

1. The petition presents a pure question of law. There is no issue of "substantial evidence" (Union Br. at I) because the material facts are not in dispute. The trial judge, upon weighing all the evidence of faculty and administration authority, found that the faculty's authority was predominant in academic areas (Pet. 4); the Board, while disagreeing with the trial judge's "application of *Yeshiva* principles to the facts of this case" (Pet. App. 24), agreed that the faculty "clearly

exercise considerable authority in academic areas" (*id.* 26); and the Court of Appeals likewise determined that the faculty "has significant authority in certain core academic matters" (*id.* 6). Thus all agree that the Cooper Union faculty shares in the management of the institution, wielding significant but not absolute authority in academic matters.

> The Board now concedes that under *Yeshiva*
>
> the sharing of authority between administration and faculty—typical of the mature private university—does not make the faculty "employees" under the Act.... The "controlling consideration" ... in *Yeshiva* was that the faculty exercised substantial authority over the academic matters that are the core of university management in a typical university.

(Board Br. at 9.) Under this interpretation of *Yeshiva*, upon the agreed facts as to shared management at Cooper Union the faculty is unquestionably managerial. Since the court below disagreed with this interpretation, certiorari should be granted "to resolve [the] apparent misunderstanding as to the application of [this Court's prior] decision ...." *Arkansas* v. *Sanders*, 442 U.S. 753, 754 (1979).

2. The Board now contends that there is no conflict in principle among the circuit courts that have been called upon to apply the legal principles of *Yeshiva* to other university faculties. This denial of any conflict is surprising, since it is at odds with the Board's own prior positions.

In *Loretto Heights College*, 264 N.L.R.B. 1107 (1982), *Lewis University*, 265 N.L.R.B. 1239 (1982), and *Cooper Union*, Pet. App. 10, the Board ruled that the faculty in each case must be regarded as nonmanagerial under the legal principles of *Yeshiva*. The Board then argued to the circuit court in each case that a proper understanding of *Yeshiva* required enforcement of its decision. The Tenth Circuit in *Loretto Heights*, 742 F.2d 1245 (10th Cir. 1984), and the Second Circuit in the decision below, Pet. App. 1, agreed with the Board; but the Seventh Circuit in the *Lewis* case, 765 F.2d 616 (7th Cir. 1985), rejected the Board's analysis and denied enforcement.

Thus, in the Board's own view, the Seventh Circuit's decision in *Lewis* represents a divergence from proper interpretation of *Yeshiva* and a conflict with those courts that have accepted the Board's interpretation. This was made explicit by the one judge on the Seventh Circuit panel who shared the Board's understanding of *Yeshiva*; that judge specifically stated that the majority's refusal to enforce the Board's order

> creates a conflict with the Tenth Circuit, which recently enforced a similar order under virtually identical circumstances. *See Loretto Heights College* . . . .

Lewis, 765 F.2d at 628-29 (Swygert, Senior Circuit Judge, dissenting). Now that the court below has adopted the Board's reasoning in this case, the conflict among the circuits over the proper interpretation and application of *Yeshiva* extends to the Second Circuit as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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